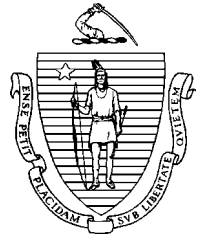




# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-93-4

### FACTS:

You are an elected Selectman in a Town. The Town's population, according to the 1990 federal census, is under 1,000.

For many years, you have also been a part-time police officer in the Town, a position appointed by the Board of Selectmen and classified as that of a "special municipal employee." Since becoming a Selectman, you have declined all compensation as Selectman and have abstained from participation as a Selectman in matters affecting the Police Department.

You now wish to work part-time plowing snow for the Town's Highway Department whenever your services are needed.<sup>1/</sup>

### QUESTION:

Does G.L. c. 268A allow you, while you remain a Selectman, to receive compensation for one or more appointed municipal positions?

### ANSWER:

If the remaining Selectmen are willing to take the steps required for exemptions under §20(c) and (d) as explained in part 1 below, you may receive compensation for more than one appointed position while remaining a Selectman. If the remaining Selectmen do not take these steps, the §20 selectman's exemption will allow you to be paid for only one municipal position of your choice, and will establish other limitations as explained in part 2 below.

### DISCUSSION:

Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest in a contract with a municipal agency, unless an exemption applies. Since §20 applies to municipal employment contracts, it generally prohibits a municipal employee from holding another municipal position that is both appointed and compensated, unless an exemption applies. *See Quinn v. State Ethics Commission*, 401 Mass. 210 (1987) (so interpreting §7, the equivalent section for state employees); *Commission Advisory No. 7 (Multiple Office Holding at the Local Level)* (1990).

In each of your three positions — Selectman, police officer, Highway Department employee — you are a "municipal employee" for the purpose of the conflict law. G.L. c. 268A, §1(g). Because you wish to hold and be paid in all three positions, §20 requires us to examine your financial interest in each of your municipal employment contracts from the viewpoint of each other municipal position you wish to hold. In each such position, §20 will prohibit you from receiving compensation in any other position (except your elected Selectman's position<sup>2/</sup>), unless you qualify for exemptions from §20. You may do so in either of the following two alternative ways.

#### 1. Section 20(c) and (d) exemptions.

In your Selectman's position, you have a financial interest in both your police officer and Highway

Department employment contracts. As a Selectman in a town with a population of 10,000 or fewer persons, you are automatically a special municipal employee. G.L. c. 268A, §1(n). Therefore, §20(d) exempts these interests if **both** (1) you file with the Town Clerk a written public disclosure of your financial interest in these two appointed positions, **and** (2) the remaining Selectmen<sup>3/</sup> approve this exemption for you.<sup>4/</sup>

In addition, in each of your police officer and Highway Department positions, you have a financial interest in your employment contract in the other appointed position.<sup>5/</sup> In your police officer position, you are a special municipal employee. Therefore, **if** (1) the remaining Selectmen<sup>6/</sup> also classify all Highway Department on-call snow-plowing positions as “special municipal employee” positions, and (2) you have filed the written public disclosure with the Town Clerk mentioned in the preceding paragraph, §20(c) exempts these interests, because in neither of these two positions do you “participate in or have official responsibility for any of the activities of the [other position’s] contracting agency.”

Note that, in order to be paid in all three positions, you must comply with all the conditions mentioned in the two preceding paragraphs.<sup>7/</sup>

## **2. Selectman’s exemption.**

As discussed above, the §20(d) exemption requires approval by the remaining Selectmen. Because it is possible that the Selectmen will not approve this exemption, we must consider whether the “selectman’s exemption” in the fourth paragraph of §20, which does not require the Selectmen’s approval, is also available to you. Without either §20(d) or the selectman’s exemption, you may not be paid for any appointive Town position while remaining a Selectman.

The fourth paragraph of §20 provides in relevant part:

This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office; provided, however, that such selectman shall not, except as hereinafter provided, receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he shall receive; provided, further, that no such selectman may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and, provided further, that no such selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter.

As discussed at length in *EC-COI-82-106*, the plain language and legislative history of this exemption indicate that it was intended to mitigate what the Legislature viewed as a harsh application of §20, as prohibiting many selectmen who previously held appointed town positions from continuing to be paid in those positions. That 1982 opinion in effect construed the then-new exemption not to repeal other exemptions, under §§20(c) and (d), already available to selectmen in smaller towns who were special municipal employees. The point of our 1982 opinion was that the conditions attached to the selectmen’s exemption did not apply to selectmen who qualified for some other exemption from §20. This analysis is consistent with later Commission opinions applying the conditions attached to other statutory exemptions from provisions of G.L. c. 268A. *See, e.g., EC-COI-92-25* (municipal exemption from §4); *92-8* (municipal and legislator’s exemptions from §4); *92-6* (construction consultant exemption from “state employee” definition in §1[q]).

In *EC-COI-87-36*, we were asked whether the selectman’s exemption’s six-month waiting period applied to “special” selectmen. Following our earlier reasoning in *EC-COI-82-106*, we decided that it did not, because such “special” selectmen were not generally in need of this exemption. We said there in dictum that the selectmen’s exemption “applies only to regular selectmen,” but this statement was based on our stated assumption that “‘special’ selectmen . . . already could hold two jobs and be paid for both,” citing §20(c) and (d). But this assumption depends on the remaining selectmen’s willingness to take the steps necessary for these exemptions; when these other exemptions are not obtained for any reason, the plain language and purpose of the selectman’s exemption suggest that it should be available to “special” as well as regular selectmen.

Therefore, without disturbing in any way our main holdings in *EC-COI-82-106* and *EC-COI-87-36*, we

now clarify that the §20 selectman's exemption is available, at their election, to "special" selectmen who cannot (or choose not to) qualify for the §20(c) or (d) exemptions. Of course, it follows that all the conditions attached to the selectman's exemption also apply in this situation.

Thus, if you wish to remain as a Selectman while being paid for an appointive Town position you held before becoming a Selectman, you must either:

1. Qualify for a §20(d) exemption (including the remaining Selectmen's approval) as discussed in part 1 above. If you wish to be paid for more than one appointed position, you must also take the steps necessary to receive a §20(c) exemption (including the remaining Selectmen's classification of every such appointed position as that of a "special municipal employee"), also discussed in part 1; or:

2. Comply with the conditions of the selectman's exemption, which requires that you: (a) decline compensation for all but one of your Town positions (for example, you may continue to be paid as a police officer, but not as either a Selectman or a Highway Department employee); (b) not vote or act as a Selectman on any matter within the purview<sup>8/</sup> of any Town agency that employs you (with or without compensation); and (c) not accept appointment to any additional Town position (for example, the Highway Department position) while you remain a Selectman and for six months thereafter.<sup>9/</sup>

**DATE AUTHORIZED:** January 26, 1993

<sup>1/</sup>This opinion addresses only your future conduct. See G.L. c. 268B, §3(g); *EC-COI-92-17* n.1.

<sup>2/</sup>Since *EC-COI-82-26*, the Commission has consistently held that an elected official's compensation is not received pursuant to any "contract."

<sup>3/</sup>Section 19 of G.L. c. 268A, which prohibits a municipal employee from knowingly participating in a particular matter in which he (among others) has a financial interest, requires that you not participate as a Selectman in the decision whether to approve this exemption for yourself. Note that participating includes discussion, voting, and informal lobbying of your colleagues (of course, you may apply for the exemption itself). See *id.* §1(p); *EC-COI-92-30*. Whenever this matter comes before the Selectmen, therefore, your best course of action is to leave the room. *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

<sup>4/</sup>The §20(c) exemption, discussed in text below, is not available to you here because, as a Selectman, you inevitably have "official responsibility" for at least some activities of both the Police and Highway Departments. See *EC-COI-91-9*; *84-125* n.6.

<sup>5/</sup>As explained in note 2 above, in these positions you do not have a financial interest in any "contract" as a Selectman.

<sup>6/</sup>As explained in note 3 above, you may not participate as a Selectman in this decision.

<sup>7/</sup>Qualifying for the indicated §20(c) and (d) exemptions is the simplest method for you to accomplish this result. More limited exemptions may be available under §20(b) and (f) and under the last paragraph of §20, but each of these also requires action by the remaining Selectmen, and some require additional procedures.

<sup>8/</sup>For detailed discussion of the meaning of an agency's "purview" (there, in the context of the §4 municipal exemption), see *EC-COI-92-25*; *92-22* and other opinions they cite.

<sup>9/</sup>Thus, the six-month waiting period applies to a "special" selectman only if he requires the benefit of the selectmen's exemption to receive compensation for an appointed Town position he held before becoming a Selectman.